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NO. 85-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals erred in holding that defendants were not entitled to a jury trial under the seventh amendment to the United States Constitution when the plaintiff's theory of recovery was promissory estoppel, even though the sole relief sought and awarded was money damages.

Whether defendants in this case waived their right, if any, to a jury trial.

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Respondents Nimrod Marketing (Overseas) Ltd. and Tom Anderson-Slight, respectfully request the Court to deny the petition for a writ of certiorari sought to overturn the opinion of the Fifth Circuit Court of Appeals in this case.

IV. STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Texas. Jurisdiction was based on diversity of citizenship. Respondent Nimrod is a United Kingdom corporation with its principal place of business in London, England.[1] FFCL, Rec. V. p. 1. Respondent Anderson-Slight is an individual who resides in London, England. *Id.* The trial court found that both petitioners conduct their principal business in Houston, Texas. *Id.* pp. 1-2. The trial court, sitting in diversity, applied the Texas law of promissory estoppel to the facts of this case. *Id.* pp. 1, 18-21.

The case was tried by the district court without a jury. The Fifth Circuit held that petitioners had not waived their right to trial by jury, but further held that petitioners were not entitled to a jury trial in a promissory estoppel case. Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d at 1079-80. The judgment was affirmed except as to the exchange rate used in calculation of damages. This holding by the Fifth Circuit in regard to damages is the subject of a cross-petition filed in this Court by respondents as cross-petitioners.

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1. Abbreviated references include the following:
   Rec: denotes documents included in the *Record Excerpts*, including pleadings, memoranda and orders of the Trial Court, *Findings of Fact and Conclusions of Law*, and portions of the trial transcript;
   FFCL: denotes the Trial Court's *Findings of Fact and Conclusions of Law;*
   Tr.: denotes page references from the transcript of proceedings;
   LL: denotes precise lines from pages of the transcript of proceedings. Because of the voluminous nature of these records, counsel for petitioners has not asked the Clerk of the Fifth Circuit to certify copies for this Court's use. Counsel for petitioners will, however, arrange for such certification of copies upon request.

V. REASONS FOR DENYING THE WRIT

A. THE DOCTRINE OF PROMISSORY ESTOPPEL IS ESSENTIALLY EQUITABLE IN NATURE.

1. Texas Authority

The Texas Supreme Court has recognized the equitable nature of a cause based on promissory estoppel. *Wheeler v. White,* 398 S.W.2d 93 (1965). Texas follows The Restatement of Contracts, § 90 which says:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding *if injustice can be avoided* only by enforcement of the promise." [emphasis supplied] 398 S.W.2d at 96.

The court went on to discuss the application of the doctrine as follows:

> The binding thread which runs through the cases applying promissory estoppel is the existence of promises designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by the promisee before he could begin to perform, and was a fact known to the promisor. As to the argument that no new cause of action may be created by such a promise regardless of its established applicability as a defense, it has been answered that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal regulations between them and to be acted

> on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights *when it would be unjust to allow him to enforce them*. See 1 Williston, Contracts, §§ 139-40 (Rev. ed. 1936); and 48 A.L.R.2d 1069 (1956). [Emphasis supplied] 398 S.W.2d at 96.

The court limited recovery to the detriment sustained, disallowing damages based on loss of anticipated profits, holding that when there is actually no legally sufficient contract, "all that is required *to achieve justice* is to put the promisee in the position he would have been in had he not acted in reliance upon the promise", 398 S.W.2d at 97, [emphasis supplied]. The question of the right to a jury trial was not discussed, since under Texas jurisprudence such right does not depend upon the legal or equitable nature of the cause of action and the remedy.

In the trial of the case *sub judice* Judge Sterling correctly recognized the essentially equitable nature of the relief that he ordered when he stated,

> The Court thus concludes that *injustice would result unless* Plaintiffs are permitted a partial recovery—in the amounts set forth below—to enforce the promise made by Defendants. (FFCL, Rec. V, p. 26, emphasis supplied).

2. Out Of State Authority

In *Walters v. Marathon Oil Company*, 642 F.2d 1098 (7th Cir. 1981), the court found in favor of plaintiff on the theory of promissory estoppel. This was a bench

trial, but the issue of the availability of a jury trial was not addressed. The court clearly found that promissory estoppel is an equitable doctrine, with the court, sitting in equity, having the power to fashion the remedy "to do complete justice", in other words, to fashion an equitable remedy.

> An equity court possesses some discretionary power to award damages in order to do complete justice. [citations omitted] Furthermore, since it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief, [citations omitted] and a district court sitting in equity may even devise a remedy which extends or exceeds the terms of a prior agreement between the parties, if it is necessary to make the injured party whole. [citation omitted]
>
> Since promissory estoppel is an equitable matter, the trial court has broad power in its choice of a remedy, and it is significant that the ancient maxim that "equity will not suffer a wrong to be without a remedy" has long been the law in the State of Indiana. 642 F.2d at 1100.

The *Walters* court held that in reliance upon the defendant's promise, the plaintiffs had invested both time and money and had foregone the opportunity to make the investment elsewhere. An award of lost profits was "appropriate in order to do complete justice."

The California Supreme Court has directly addressed the issue of the right to a jury trial in a promissory estoppel case in *C & K Engineering Contractors v. Amber Steel Company*, 587 P.2d 1136 (1978). The court reviewed the writings of various treatise writers and commentators and concluded that:

> ". . . the doctrine of promissory estoppel is essentially equitable in nature, developed to provide a remedy (namely, enforcement of a gratuitous promise) which was not generally available in courts of law prior to 1850. 587 P.2d at 1139.

The California court went on to determine that there was no right to a trial by jury. Its Constitution has a provision similar to the Seventh Amendment, which limits the guarantee of a jury trial to such right as existed at common law in 1850. The plaintiff's request for a money recovery did not convert his action into an "action at law" because damages at law were unavailable in actions for breach of a gratuitous promise. Without the employment of the essentially equitable doctrine of promissory estoppel, there was no remedy at all.

> . . . [I]n the present case, the trier of fact is called upon to determine whether "Injustice can be avoided only by enforcement of [defendant's] promise." (Rest., Contracts, § 90.) The "gist" of such an action is equitable. Both historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not the jury. We conclude that the trial court properly treated the action as equitable in nature, to be tried by the court with or without an advisory jury as the court elected. (587 P.2d at 1141).

B. THE FIFTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS v. LOETHER*, 415 U.S. 189 (1974).

In *Curtis v. Loether,* the Supreme Court held that a jury trial was available on proper demand in an action

brought to redress violations of Title VIII of the Civil Rights Act of 1968. The court held that the constitutional right to jury trial was not limited to the common law forms of action that existed in 1791, but was equally applicable to statutory causes of action "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194. The court analogized the statute's specific allowance of actual damages as creating an action sounding basically in tort with the statute merely defining a new legal duty.

Promissory estoppel cannot be analogized to a tort. Neither is it an action on a contract, even though one may have been contemplated by the parties. "This [promissory estoppel] does not create a contract where none existed before . . ." *Wheeler v. White,* 398 S.W.2d 93 (Tex. Sup. 1965). It is comparing apples to oranges to compare a promissory estoppel action with its equitable remedy to an action seeking damages for breach of contract (even those where fraud and deceit are involved). The traditional remedy for breach of contract is the granting to plaintiff the benefit of the bargain as if the contract had been performed, usually translated into money damages; in promissory estoppel cases the remedy is to fashion relief that will avoid injustice, usually translated into a money recovery based on detrimental reliance. The respondents based their case solely on promissory estoppel and sought only the remedies afforded by that theory of recovery. The equitable nature of such a claim is supported by authority cited herein, particularly *Walters v. Marathon Oil Company, supra* and *C & K Engineering Contractors v. Amber Steel Company, supra.*

C. THERE IS NO CONFLICT IN THE FEDERAL CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN A CLAIM IS BROUGHT UNDER THE THEORY OF PROMISSORY ESTOPPEL.

Petitioners have pointed to no federal cases holding that a jury trial is required when a claim is brought under the theory of promissory estoppel. The federal case cited by respondents clearly held that promissory estoppel is an equitable doctrine with a remedy, including an award of damages, to be determined by "an equity court". *Walters v. Marathon Oil Company, supra.*

The cases cited by petitioners to indicate a conflict all deal with rights under 42 U.S.C. § 1981. The Fifth Circuit in *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984) held that a claim for reinstatement and back pay is equitable in nature. *Accord, Moore v. Sun Oil Co. of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980); *Contra Setser v. Novack Investment Co.,* 638 F.2d 1137 (8th Cir. 1981).

D. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE.

Petitioners seek to have this court grant certiorari in this case to establish a broad precedent that whenever a monetary relief is sought, a jury trial is required, regardless of the nature of the proceedings. Such a holding would be overly broad and has never been and should not be applied to a case based on the equitable doctrine of promissory estoppel. Such an overly broad holding was specifically rejected in *Curtis v. Loether, supra,* at 1009, when this Court stated,

> We need not, and do not, go so far as to say that any award of monetary relief must necessarily be "legal" relief.

E. PETITIONERS WAIVED THEIR RIGHT, IF ANY, TO A TRIAL BY JURY.

As an additional argument against the granting of writ of certiorari to determine petitioners alleged right to a trial by jury, respondents would also urge that petitioners waived any right to jury trial that they may have had. This was the ruling of the district judge. The Fifth Circuit denied waiver.

At the time of the trial the court was under the impression that the case was non-jury and, upon looking, did not find the jury demand in the complaint. Defense counsel, at the cout's urging, also looked through the pleadings and stated he was unable to find a jury demand. Defense counsel then relied upon his jury request made in the pre-trial order, which was obviously past the twenty-day limit. By his conduct, defense counsel waived whatever reliance he may have placed on the initial pleadings, which did contain a jury demand, and explicitly left the matter to the court's discretion. The court had already expressed its opinion that this was not a case where the jury would be much help and the court properly overruled the defense's belated jury request. Tr. Sept. 8, 1983, Rec. VIII, pp. 5-7, attached hereto as an appendix.

The failure of counsel for petitioners to indicate or demonstrate to the court that a jury demand had been made, when, and by whom, when ample opportunity was provided by the court, including inviting the defense

counsel to review the court's file, constitutes waiver of defense counsel's right to rely upon the respondents' jury demand.

Further evidence of the fact that counsel for petitioners waived his right to rely upon respondents' prior jury demand is found in the transcript of the proceedings, wherein it is reflected that counsel for petitioners indicated to the court "And let's leave it to the Court's discretion, I guess". *Ibid,* p. 5, Ll. 22, 23.

The right to jury trial, like other constitutional rights, can be waived by the parties. *U.S. v. Moore,* 1951, 71 S. Ct. 524, 527, 340 U.S. 616, 95 L.Ed. 582. *See generally* 9 Wright & Miller, *Federal Practice and Procedure,* § 2321 (1971). For instance, the failure to make a timely demand will result in a waiver even though it was inadvertent and unintended. 9 Wright & Miller, op. cit. § 2321, p. 102; *Bush v. Allstate Ins. Co.,* 425 F.2d 393, 396 (5th Cir. 1970).

The right to jury trial may also be waived by conduct of the parties. In *Smith v. Cushman Motor Works, Inc.,* 178 F.2d 953 (8th Cir. 1950), appellant failed to object to a bench trial until after a complete trial wherein the key question was found against appellant. In our case, petitioners failed to particularly point out to the court the jury demand upon which they allegedly relied until after a complete trial in which the court held against them.

In *Reid Bros. Logging Co. v. Ketchikan Pulp Co.,* 699 F.2d 1292 (9th Cir.), *cert. denied,* 104 S. Ct. 279, the defendant's consistent efforts to defeat the plaintiff's jury request demonstrated that defendant was not relying

upon that request and constituted a waiver of defendant's right to object when plaintiff withdrew its jury request. In our case, petitioners' failure or refusal to point out to the court respondents' jury request upon which they now allege that they relied constituted a waiver to object to the trial by the court.

In *Chapman v. Kleindist,* 507 F.2d 1246 (7th Cir. 1974), the appellate court, in reviewing the record believed that the trial judge, who conducted a hearing without a jury, was simply unaware of the jury demand. The court held that, normally, the failure to object under such circumstances would constitute a waiver of the right to a jury trial. (The plaintiff was entitled to a jury trial on remand only because he had not been represented by counsel). Similarly, in our case the trial judge believed that there had been no jury demand. The petitioners failed to make a meaningful objection by pointing out to the court any jury demand in the record; petitioners chose to rely instead on their own late jury demand, appealing to the discretion of the court.

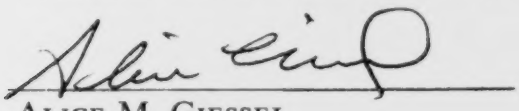
The petitioners waived any right they might have to rely upon respondents' jury demand by failing or refusing to point out to the court, prior to trial or during trial, the jury request upon which they relied. It was, apparently, only after an adverse verdict that petitioners were able to discover what they now claim was obvious. The petitioners chose to waive and abandon a claim to that right and presented to the court instead their own belated request. The court, in its discretion, properly denied their jury demand.

CONCLUSION

For the above-enumerated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GIESSEL, STONE, BARKER & LYMAN



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APPENDIX

Excerpt From The Transcript Of Testimony, Tr. Sept. 8, 1983, Rec. VIII, pp. 5-7

THE COURT: All right. We will take up Civil Action H-81-3275, Nimrod Marketing Overseas, Limited, versus Texas Energy Investment Corporation and others.

MR. KIRK: Your Honor, excuse me, Dana Kirk for the Defendant. We had a little misunderstanding about whether there was a Jury or a nonjury. The Defendants had planned a Jury and put that in the pretrial and for some reason that slipped through the cracks. We would respectfully request a Jury trial in this case.

THE COURT: I noticed that in the pretrial order and this is one of them where I thought I had kind of brow-beat everybody into the notion that we wouldn't have a Jury or was that another case? I have been known to attempt that.

MR. KIRK: I think the last—I wasn't at the last docket call, Judge, because I was out of town. But at the time before you asked if it would be nonjury and I respectfully requested a Jury and I don't think you brow-beat us too much. But I did request a Jury at that time.

THE COURT: Well, that was at that docket call. Had you done it prior to that?

MR. KIRK: Yes, I done it on my answer I am quite sure, although I would like to consult the pleadings to make doubly sure of that and I thought Henry had also in his answer. But—I don't know whether I did or not. But it was in the pretrial order.

THE COURT: Well, all right. Let's—for openers it's not noted on the front of the docket sheet.

MR. GIESSEL: I always thought it was nonjury, but I may be mistaken too.

THE COURT: Well, let's take a look. Let's take a look. Well, let's look first at the complaint as to whether or not there's any. No Jury demand in the complaint. Let's look at the original answer. Number 16, is that what you told me?

THE CLERK: Yes, sir.

MR. KIRK: You usually put it at the bottom, Judge. If it was there it's likely it's at the bottom.

THE COURT: I don't find it, Mr. Kirk.

. . . .

MR. KIRK: Well, I thought that it was either in Henry's complaint or amended complaint or in my answer or my amended answer. And we did make it in the pre-trial order and the Defendant would request a Jury in this case. And let's leave it to the Court's discretion, I guess.

THE COURT: Well, I'll be delighted for you to look here. It's supposed to be made within 20 days after issue is joined, if I remember the rule correctly.

MR. KIRK: You understand of course we have no doubt that the Court would be fair in the case; it's just that we think our case would be tried a little better to a Jury.

THE COURT: Well, I think your case in front of a Jury would be just a situation of trying to get them so mixed up and confused they would just be guessing.

. . . .

MR. KIRK: I don't find it in our pleading file and I do for the record adhere to my request for a Jury.

THE COURT: Oh, all right, It's overruled. We will try it without a Jury.